SUPREME COURT, U. S.

JAN 8 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 911

BENJAMIN DRANOW,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

Petition for A Writ of Certiorari To the United States Court of Appeals for the Seventh Circuit

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Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on August 15, 1968.

OPINIONS BELOW

of Appeals appear at 367 F.2d 698. The District Court's opinion on remand by this Court is reported at 273 F.Supp. 141. The majority and dissenting opinions of the Court of Appeals on the instant appeal are not yet reported. All opinions have been printed in the appendix of the petition, filed, contemporaneously with this petition,

by the remaining defendants-appellants in the Court below, who are named herein, and which this petition adopts.

JURISDICTION

The judgment of the Court of Appeals was entered on August 15, 1968. A timely petition for rehearing was denied on November 7, 1968. On November 26, 1968, Mr. Chief Justice Warren extended the time for the filing of a petition for a writ of certiorari to January 6, 1969. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

STATEMENT

In the interest of expediency, of economy and for the benefit of this Court, this petitioner adopts, as fully as if set forth herein, the Statement contained in the Petition for a Writ of Certiorari To the United States Court of Appeals for the Seventh Circuit, which is being filed contemporaneously with this Petition by Petitioners James R. Hoffa, Zachary A. Strate, Jr., S. George Burris, Abe I. Weinblatt and Calvin Kovens, wherein the United States of America is also the respondent.

This petitioner, in addition to the statement of the above named petitioners, which he has adopted, sets forth the additional pertinent facts applicable to the question that he presents by this petition, which is not presented by the petition of the remaining petitioners. "H.D.A." references are to the pages of the appendix for defendants-appellants filed in the Court of Appeals in the second appeal, No. 16634.

From the very inception of the pretrial proceedings, in 1963, irrational conduct by petitioner Dranow was brought to the Court's attention. At arraignment, he would not enter a plea. (H.D.A. p. 461). On June 25, 1963, his attorney informed the Court of Dranow's complaint of a visit to him in prison by Justice Department agents requesting him to give perjured testimony at the trial. Counsel stated that Dranow "is virtually half insane." (H.D.A. p. 462). Even Government counsel early informed the Court that the Government feared a conflict might arise between Dranow and his counsel (H.D.A. 463-465).

In late March, 1964, the Court received a letter from Dranow, who was then in prison at Leavenworth, Kansas complaining of his physical condition. (H.D.A. 474). In early April, 1964, Dranow was transferred to Chicago for the impending trial. Due to Dranow's physical condition, he was later transferred to a jail with more satisfactory facilities (H.D.A. 476).

Prior to commencement of trial, on April 27, 1964, counsel informed the court that: (1) Dranow had been unable to confer intelligently with counsel; (2) Dranow had informed them that he was not physically or mentally capable of aiding and assisting in the preparation of his defense; (3) Dranow could not speak coherently; and (4) they were of the belief that Dranow could not intelligently aid and assist counsel in the preparation of his defense. They requested that the Court have Dranow examined by doctors to determine "whether or not he is mentally capable of assisting counsel in the preparation of this case." (H.D.A. 493).

Government counsel requested that, if formal papers were filed showing sufficient basis for the Court

to order a hearing, the Government then be afforded an opportunity to have Dranow examined by doctors selected by the Government. The Government also suggested that the Court select an impartial psychiatrist to act in the matter. (H.D.A. 498). Dranow's counsel requested that the Court, on its own motion, have Dranow examined. Dranow's counsel stated that they hoped to secure written reports from doctors who had examined and treated Dranow. (H.D.A. 499). During this conference, Dranow's counsel told the Court that a doctor who had attended Dranow had indicated to him by telephone that Dranow had a "very serious mental aberration" as well as "many, many things wrong with him physically" (H.D.A. 500), and that he "is in a very, very serious condition both mentally and physically." The Court did not select a doctor, but suggested that the Government and defense have Dranow examined.

At this conference, Dranow's counsel also told the Court that Dranow had vacillated on whether he wanted them to represent him, and requested that the Court determine from Dranow whether he desired that they continue to represent him. Dranow was brought into chambers and, in response to a direct question, stated that it was satisfactory for Ragano and Schiffer to continue their representation (H.D.A. 502).

The next day, April 28, 1964, the Government, pursuant to oral motion by Dranow's counsel on the previous day, submitted to the Court a proposed order to appoint three doctors selected by the Government to examine Dranow on the following day. Dranow's counsel requested that the examination be deferred until after reports had been received from the doctors who had previously examined and treated Dranow.

At this conference in chambers, Dranow's statements and conduct were not only irrational, but he also exhibited an unwillingness to cooperate with his counsel. Dranow refused to be examined in a hospital (H.D.A. 508).

Dranow imagined that the doctors were putting needles in him and that, "The prisons took a hundred needles out of me" (H.D.A. 513). Dranow's counsel at that time, Mr. Schiffer, advised the Court that Dranow did not understand much of what was said to him. (H.D.A. 513). Even at the first trial the Petitioner sent a telegram to the Court choosing to be his own lawyer. Yet when called into chambers he responded to the Court's questioning that he desired to proceed with this counsel (H.D.A. 532, 533).

This petitioner took the witness stand at the original trial and testified against the advice of his counsel and that of counsel for other defendants (H.D.A. 536, 537). Thereafter his conduct on the stand demonstrated his incompetency (H.D.A. 537 through 584).

Since the date of the original trial, Dranow's mental condition has deteriorated. The medical records at the Medical Center for Federal Prisoners at Springfield, Missouri, reflected that Mr. Dranow had been in solitary confinement in the psychiatric ward at that facility for approximately ten and one half months prior to the hearing which is now the subject of this appeal (H.D.A. 679).

In December 1966, Doctor Hildreth, the staff psychiatrist of the above described government medical center, felt that Dranow was "a paranoid personality characterized by extreme sensitivity in interpersonal

relationships, a conspicuous tendency to use the projection mechanism and avoidance of close relationships with others" (H.D.A. 190). These same records note that on March 17, 1967, Dranow was noted to be very grandiose, loud, emotionally labile, and paranoid. A psychiatrist was asked to see him immediately.

These records, in the "Discharge Impressions" contained a finding that Dranow suffered from "chronic paranoid schizophrenia with depressive and paranoid features." (H.D.A. 191). This impression was dated April 4, 1967.

On May 9, 1967, the progress notes of Doctor Hildreth contains the entry that, "Mr. Dranow exhibits many gross disturbances of thought . . . , often makes up words in substitution for real words. Often his thoughts are difficult to follow since there seems to be no logical sequence. He is acusatory and bombastic, accuses the physician of persecuting him. He still is generally hyperactive and extremely angry. Grossly psychotic at this time." (H.D.A. 197).

On May 12, 1967, the same Doctor Hildreth expressed the opinion that Dranow was "grossly psychotic and becoming increasingly withdrawn as time goes along." (H.D.A. 197).

Doctor Joseph F. Alderete, Chief, Psychiatric Service, on April 26, 1967 diagnosed Dranow as "borderline schizophrenic reaction, paranoid type, of a chronic nature, of mild to moderate severity." (H.D.A. 196).

At the hearing on July 25, 1967, Doctor John R. Adams testified concerning the appellants mental condition. Doctor Adams' qualifications are set forth on

pages 201 through 206 of the Appendix for Defendants-Appellants. He was a Fellow, The Menninger Foundation School of Psychiatry, Topeka, Kansas, 1946-1949. In addition to many other honors he holds the position of Chief, Neuropsychiatric Service, Passavant Memorial Hospital, Chicago, and has held this position since 1954. He has been with the Northwestern University Medical School, Department of Neurology and Psychiatry since 1954 and is a full Professor with that school at this time. He is certified by the American Board of Neurology and Psychiatry in Psychiatry. He has had numerous publications.

Doctor Kesert, who testified for the government, recognized Doctor Adams as a reputable psychiatrist (H.D.A. 687). Doctor Adams testified, in part:

> "A. In the sense that Mr. Dranow's responses to and reactions to the situation about him are dominantly governed by the mood, by the pathologically depressed mood, it would follow that he, in many instances, would not respond with good and prudent judgment, would not necessarily respond logically, because the responses are determined essentially by the mood.
>
> Q. All right, Doctor. Let me ask you this: Have you an opinion, based on a reasonable medical certainty, and based upon your examination of Mr. Benjamin Dranow and Defendant's Exhibits 1-A, 1-B and 1-C, as to whether or not Mr. Dranow was capable of cooperating with counsel in this case?
>
> A. By his own statement to me, he had no interest in cooperating with counsel. I feel that he is not able to. Part of the reason for that is the fact that the person severely depressed is self-deprecatory and usually is self-destructive. It would follow from this that a tendency to not cooperate,

even though it be to his own disinterest, would be completely consistent with his pathological condition.

Q. Based upon your examination of Mr. Dranow and Defendant's Exhibits 1-A, 1-B and 1-C, would you say that he understands the nature — do you have an opinion as to whether or not he understands the nature of these proceedings.

A. It was my distinct impression during my conversation with him that he was not clear as to the precise technical nature of these proceedings. It was my impression that he viewed the activity as though it were a trial — it was not possible to elicit a full and extensive response, but it was distinctly my impression that he was not accurately perceptive of this proceeding." (H.D.A. 764, 765)

Doctor Adams further stated, upon questioning by the Court:

"The Witness: Certainly I saw many evidences of paranoid symptoms. To me the degree of incapacity is reflected in the depression.

Now, this is still consistent, because profound depression certainly is a frequent finding in paranoid schizophrenia. I saw nothing that was in opposition to the conclusions reached in Springfield.

The Court: But because of the insufficiency of your examination, you didn't feel qualified to make a diagnosis, is that it?

The Witness: I would have called him, as he was most recently called in the records here, psychotic depression." (H.D.A. 770)

Doctor B. Cullen Burris also testified concerning Mr. Dranow's condition. His qualifications are set forth on pages 207 through 210. He also has board certification from the American Board of Psychiatry.

Doctor Burris testified that he examined Mr. Dranow on July 24, 1967 and that Dranow was suffering from a severe depression (H.D.A. 775), and that he did not feel that, "Mr. Dranow is capable of cooperating with counsel." (H.D.A. 776).

Doctor Melvin N. Seglin, whose qualifications are set forth on pages 213-214, which includes being a Diplomate, American Board of Psychiatry and Neurology, testified that, "I feel fairly certain that he (Dranow) is unable to cooperate with counsel." (H.D.A. 779; See also 210-213).

Opposel to these eminent psychiatrists was the opinion of Doctor Benjamin Kesert, who is not "board certified" in psychiatry (H.D.A. 706), who had been employed by the government for some thirty years (H.D.A. 676) and who is drawing a government pension (H.D.A. 676). It is further noted that Doctor Kesert has a history of being, at the least, flexible. On December 6, 1965, he wrote to the United States Attorney that another defendant he had examined, a William Bass, was mentally capable of understanding the charges against him. On October 11, 1965, only two months earlier, he had written concerning the same patient:

> "The psychiatric picture that the patient presents leads me to conclude that he has a condition that can best be classified as chronic schizophrenic reaction. He has been in trouble through the years and is leading a more or less vegetative existence. It is amazing he still has competent people running his business in which he does not participate and draws a fairly good salary.
>
> "I believe he cannot understand the charges against him and would not be able to cooperate with counsel in his defense of the charges preferred against him by the Government." (H.D.A. 709)

QUESTIONS PRESENTED

This petitioner adopts the questions presented for review by the remaining petitioners named above and the argument presented by those petitioners for the allowance of the writ. In addition, this petitioner presents the following question and argument thereon.

CAN A CRIMINAL CONVICTION STAND WHERE THE DEFENDANT WAS NOT MENTALLY COMPETENT TO UNDERSTAND THE NATURE OF THE PROCEEDING AND WAS UNABLE TO ASSIST HIS COUNSEL?

ARGUMENT

"It is fundamental that an insane person can neither plead to an arraignment, be subjected to a trial, or, after trial, receive judgment, or, after judgment, undergo punishment." *Youtsey v. United States,* 97 F.937, 6th Cir., (1899).

There is no doubt that the standard for competency to stand trial is not necessarily the same as the standard of competency required to be held responsible for the commission of the act charged. However, the standard is not met by a mere showing that the appellant is oriented as to time and place and has some recollection of events. The test must be, "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States,* 80 S. Ct. 788, 362 U.S. 402, 4 L.ed 2d 824.

The test delineated above, when applied to the condition of Benjamin Dranow, reflects that Mr. Dranow fails the test on every count. Both counsel for Dranow,

Mr. Schiffer and Mr. Ragano, repeatedly expressed their inability to intelligently consult with Dranow. The record of the original trial, with Dranow's many outbursts, reflects his counsel's difficulty in controlling Dranow and keeping his answers intelligible. Dranow's conduct during the trial and the subsequent "bugging" hearing; his record at the Medical Center for Federal Pisoners, Springfield, Missouri; the opinions of qualified psychiatrists at this federal faculty; plus the opinions of three eminent psychiatrists from the Chicago area, all establish the almost irrefutable conclusion that Mr. Dranow did not have sufficient present ability to consult with his lawyer within a reasonable degree of rational understanding and that he did not have a rational as well as factual understanding of the proceedings against him.

The sole support to the Court's holding that Dranow was capable of proceeding with the hearing is found in the testimony of Doctor Kesert. It is interesting to note that Doctor Kesert was not certain himself of the nature of the proceedings (H.D.A. 671-675) and, therefore, it is submitted that his opinion should carry little weight. As compared to the many eminent psychiatrists who testified and whose reports reflect that Dranow was not mentally competent, Dr. Kesert is found to be not "board certified" in psychiatry; has been employed by the government for some 30 years; and is presently drawing a government pension. Dr. Kesert's examination, as compared to the extensive time that Mr. Dranow was subject to observations at the federal facility, was brief (H.D.A. 676). Counsel for Dranow, Frank Ragano and Jacques Schiffer, both testified at the hearing that Dranow was not capable of cooperating and did not comprehend the significance of the proceedings (H.D.A. 1536). Although no other lay

witnesses testified, all counsel for the co-defendants expressed their unqualified opinions throughout that Dranow was not capable of assisting counsel.

The Court's finding that this appellant was capable of assisting counsel and proceeding with the hearing which is the subject of this appeal was erroneous as not being based upon "substantial" testimony. *United States v. Westerhausen,* 7th Cir. 283 F.2d 844 (1960).

Even though a defendant is able to give an account of the circumstances surrounding his offense, if his thinking is colored by insane delusion or ever severe *depression,* he may be incompetent to assist in his defense. See "Psychiatric Examinations in Federal Mental Competency Proceedings" by Charles E. Smith, M. D., Medical Director, Federal Bureau of Prisons, 7 F.R.D. 171, 174. Dranow's history is replete with his sufferings from severe depression before and at the time of the hearing involved.

The findings of the trial court on this issue, we submit even reaches such heights as to "shock the conscience". See *Holloway v. United States,* D.C. Cir., 148 F.2d 665 (1945). The total proof, when all considered together, does far more than leave a reasonable doubt of Dranow's sanity at the time of this hearing.

CONCLUSION

For the foregoing reasons this petition should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition has been mailed this 3rd day of January, 1969 to the Solicitor General, Department of Justice, Washington, D. C. 20530 and to Fred M. Vinson, Jr., Assistant General, Department of Justice, Washington, D. C.

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